

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

ADJUSTMENT OF GAS AND ELECTRIC RATES)
OF LOUISVILLE GAS AND ELECTRIC COMPANY) CASE NO. 10064

O R D E R

On August 17, 1988, Louisville Gas and Electric Company ("LG&E") filed a motion requesting the Commission to instruct its Staff to file testimony, and be subject to cross-examination, on the Staff's position and rationale on the accounting treatment of the early retirement of six sulfur dioxide removal systems and three underground gas storage fields, and any related adjustments to capitalization. Alternatively, LG&E requests that the Staff file a written statement setting forth its position on the accounting treatment of the early retirements. The motion is based on LG&E's argument that because the proper accounting treatment for early retirements was an issue raised by the Staff through data requests and cross-examination, LG&E is entitled to confront and cross-examine the Staff on its analysis, information, assumptions, and other matters not contained in the record.

Based on LG&E's motion, and being advised, the Commission is of the opinion and hereby finds that the motion lacks merit and should be denied. The Commission's decision to require the early retirements to be accounted for as extraordinary property losses is fully supported by the record evidence. There were extensive

data requests¹ and protracted cross-examination² on the issue. LG&E was put on notice by the Data Request in the Commission's Order dated December 23, 1987, Item 42, which stated that there was:

[C]oncern over the impact current LG&E accounting treatments of early retirements and abandonments were having on the accumulated depreciation accounts and the net original rate base. This issue should be further explored in this rate case.

The Commission has afforded LG&E its full due process rights. Those rights include the right to know what evidence is considered and to have an opportunity to test, explain, or refute that evidence. See Utility Regulatory Commission v. Kentucky Water Service Co., Ky. App., 642 S.W.2d 591 (1982). Although the Court of Appeals noted in Kentucky Water Service, at page 593, that, "The company had no opportunity for a hearing to examine staff members performing the calculations. . .," the Court held that the Constitution required only that parties be afforded a meaningful opportunity to be heard. There is not even an implication by the Court that due process affords parties to a Commission proceeding the right to cross-examine the Commission's Staff.

The Commission has gone to extraordinary lengths to insure that parties to Commission proceedings have been afforded their due process rights. In addition to putting LG&E on notice that the early retirements would be an issue in this case, and allowing

¹ Commission Information Request, Order dated December 23, 1987, Item 42 and Commission Information Request, Order dated January 15, 1988, Item 69.

² Hearing Transcript Volume III, pages 177-201; Volume IV, pages 4-25, 55-59, and 146-149.

cross-examination and redirect testimony of LG&E's accounting witness, the Commission has also granted LG&E rehearing on this issue. This will then allow LG&E two opportunities to be heard. Neither the Constitution nor the statutes require more.

IT IS THEREFORE ORDERED that LG&E's motion to have the Commission's Staff file testimony or file a report be and it hereby is denied.

Done at Frankfort, Kentucky, this 6th day of September, 1988.

PUBLIC SERVICE COMMISSION
Chairman Richard D. Heman
respectfully dissents from
majority opinion.

Chairman



Vice Chairman



Commissioner

ATTEST:

Executive Director

DISSENTING OPINION OF RICHARD D. HEMAN, JR.
Case No. 10064 - Louisville Gas and Electric Company
Order Entered September 6, 1988

In Case No. 10069 (Notice of Adjustment of the Rates of Kentucky-American Water Company) the Staff and the Company signed a settlement agreement. In my dissent to the Commission's Order entered June 3, 1988, I contended that the Attorney General and Lexington-Fayette Urban County Government, Intervenor, should have an opportunity to cross-examine the Staff. Since that dissent relates to the views expressed here, a copy is attached (Appendix A).

The accounting treatment of the sulphur dioxide removal systems and the abandonment of the gas storage fields was a Staff issue. Staff prepared data requests and undertook extensive cross-examination. This was an important initiative on a complex issue which resulted in an adjustment of approximately \$2.2 million.

The absence of Staff testimony (and cross-examination) in the public record is a continuing concern. It is especially troublesome when we have an issue initiated by Staff. The focus usually seems to be on "notice", that is, was proper notice given of an issue to be examined by Staff. If notice of an issue and information requests concerning that issue constitutes due process, it is, in my opinion, an inferior kind of due process. We stand virtually alone among the state regulatory commissions in this regard. This is not good enough. We must do better.

Staff testimony is now submitted in cases involving small utilities (Staff Report) and medium-sized utilities (prepared questions and answers). We have made considerable progress. As we aim toward the large cases the question of Staff resources arises. However, if Staff cannot provide testimony on all of the issues in a major case at this time, it can do so on some of the issues.

As to Staff resources - on many issues Staff cross-examination consumes a great deal of time and requires much preparation as it did in this case. This is a demonstration of what I think everyone must have observed for a long time - that is, it is arduous and extremely difficult to establish a position or develop a case only by cross-examination. This should be kept in mind when we consider time and resources.

Further (on resources) - the absence of Staff testimony or a Staff Report slows a major policy objective of the Commission: the establishment of case settlement procedures. In many instances settlements could save time and resources. We have cancelled settlement conferences or declined to schedule settlement conferences because of the need to have Staff testimony either by prepared questions and answers or a written report. The participants in settlement conferences should establish initial positions in written form.

The long debate in this case over the Staff request that the Company provide a regression analysis relative to its proposed temperature adjustment and the Commission's ruling that it be

provided presents another dilemma. This is discussed at pages 8-9 of the brief of Anthony Martin, Counsel for Residential Intervenors:

"However, evidence to be used in deciding this case should have someone willing to stand up and take responsibility for it to be given any weight. This is the very minimal test." (Emphasis is Mr. Martin's)

Paul Reilender, Assistant Attorney General, agrees with Mr. Martin at page 26 of his brief:

"In addition to the due process claims raised by the intervenors regarding its introduction, there is the real and practical problem that no witness is sponsoring this regression analysis." (Emphasis is Mr. Reilender's)

The public record should include the positions considered by the Commission in reaching a decision. This is a significant issue. The Staff has done a great deal of work on the matter and should testify and be subject to cross-examination.

I would sustain the Motion of Louisville Gas and Electric Company.


Richard D. Heman, Jr.
Chairman
Public Service Commission

APPENDIX A

to dissenting opinion
Chairman Richard D. He
in Case No. 10064.

DISSENTING OPINION OF RICHARD D. HEMAN, JR.

Case No. 10069 - Kentucky-American Water Company

At the hearing held May 5, 1988, to consider the reasonableness of the proposed settlement between Kentucky-American and Staff, the Attorney General and the Lexington-Fayette Urban County Government filed a Motion to Reject "Proposed Settlement". Among other things, the Motion stated that the Order (Settlement) is unlawful in that it does not permit Intervenors to confront and examine Staff. The Commission overruled the Motion. My concern goes to the refusal to allow Intervenors to question Staff, and I believe the Commission should reconsider its ruling.

I believe the Commission may approve contested settlements provided a party not signing the settlement agreement is afforded an opportunity to present evidence and cross examine witnesses at the settlement hearing. This includes examination of Staff. Staff did not prefile testimony. However, I believe the settlement procedure used here is valid provided we allow direct examination and cross examination of Staff (and discovery, if necessary).

The Motion also referred to the burden of proof. The utility clearly has the burden of proof with respect to the reasonableness of its proposed rates (KRS 278.190). I do not believe the burden has shifted.

At the hearing there was discussion as to the "burden of going forward" on the party (or parties) who have not agreed to the settlement (Transcript at page 21 and following). The burden of going forward is not a shifting of the statutory burden of proof. However, I think the Attorney General makes a good point at page 22 - "Well, I don't think we should have to have the burden of going forward either, because we have not had the opportunity to cross examine the staff, we have not had the opportunity to do any discovery".

In my judgment the "burden of going forward" is not fairly assigned without the opportunity to question the Staff.

I do not agree with the position set forth in the Motion that Staff can only participate in a settlement conference on an informal basis, and that the Staff cannot take a formal position with respect to the reasonableness of the settlement. Staff is a necessary participant. The procedures followed by many Commissions of which I am aware do not require that Staff be formally designated a party in order to fully and formally participate in a settlement proceeding or to file testimony, submit briefs and the like. The regulations of our Commission do not preclude active, formal participation by Staff in the negotiations. But if these regulations need to be clarified, let us do so.

The settlement process is a viable alternative to litigation in balancing the interests of the parties and arriving at a

result which is in the public interest. As stated, the Staff must participate. Staff represents the public interest, that is, the statutory obligation of the Commission to establish rates which (1) allow the regulated utility to remain viable in order to provide safe and adequate service, and (2) allow consumers to receive service at rates which are fair, just and reasonable.

The Staff perspective, although coinciding on some issues, differs from that of the other participants. The Staff represents no particular constituency. It has no ax to grind. In negotiations the Staff cannot be merely an observer, an advisor, a mediator, a conciliator, an arbitrator, or a referee. Rather, it must independently and vigorously negotiate for the public interest.

In this instance ground rules were not established at the beginning of the settlement conference. Staff was not informed by the Commission that it should be prepared for direct examination, cross examination and possible discovery at the settlement hearing should an agreement be reached which did not include all participants. This was an error. However, a subsequent proceeding could be scheduled for this purpose.

Questions have been raised concerning due process - and fairness. The Commission and Staff are implementing Staff testimony in cases. We must press forward. This is the practice of virtually every Commission in the land. It will facilitate settlements. It will provide accountability. It will

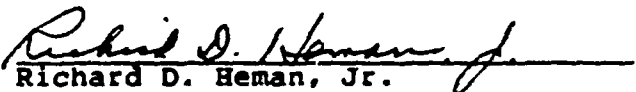
enable the Commission to more fully assess Staff positions. It will result in a better and more complete public record on which a decision can be based.

I doubt whether any regulator would deny the extremely important role of the Staff and its significant and necessary input into Commission decisions. In a recent Commission case (Case No. 9310, Sanitation District No. 1 of Campbell and Kenton Counties, November 13, 1985 Transcript, Pages 34 and 35] the question was asked from the bench whether, by the same reasoning being applied by Applicant's counsel to the Commission Staff, due process rights would be violated if a clerk to a Judge had expressed strong opinions about a case after analyzing it and communicated those to a Judge in a conference room and yet was not subject to cross examination on the witness stand. William Robinson, counsel for Applicant, responded, in part:

"I would not begin to speak as President of the Kentucky Bar Association without the authority of our Board on this or any other issue. But if I might just speak as counsel for the Sanitation District in this hearing, I can only say in comment with very quick reflection obviously, that in our dealings with the staff, and for me this is a new experience, we did not understand ourselves to be dealing with a clerk to a Judge, but we understood ourselves to be dealing with someone who purports to be in an adversary situation, who purports to, and I say that professionally not anything other than professional adversary, it is the nature of the system as I have seen it so far, and it is in any context professionally for someone like myself. We can prepare our side of the case, but to point out the obvious, Commissioner, we cannot rebut an argument that we cannot hear. We cannot rebut proof that we do not see. We can only come before you and argue the proof that we do see, that we did develop at some considerable expense and that we did present conscientiously and in good faith..." (Emphasis supplied.)

It is the nature of the system I have observed.

I believe the Commission should reconsider its ruling with respect to the Motion of the Attorney General and Lexington-Fayette Urban County Government. We should either (1) schedule a hearing for the purpose of direct examination and cross examination of Staff on the proposed settlement or (2) reject the settlement agreement and proceed to a hearing on the merits of the case.


Richard D. Heman, Jr.
Chairman
Kentucky Public Service Commission